Office-Supreme Court, U.S.
FILED
AUG 27 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2206

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOPHIA T. STROM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Hungerford v. *United States*, 307 F. 2d 99 3

Kossick v. *United States*, 330 F. 2d 933, cert. denied, 379 U.S. 837 ..... 3, 4

Modave v. *Long Island Jewish Medical Center*, 501 F. 2d 1065 4

Ramirez v. *United States*, 567 F. 2d 854 3

United States v. *Kubrick*, 444 U.S. 111 3

Statutes:

Federal Tort Claims Act:

28 U.S.C. 2401(b) 2

28 U.S.C. 2671 2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2206

SOPHIA T. STROM, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in holding that her medical malpractice claim was barred by the two-year statute of limitations of the Federal Tort Claims Act.

1. Petitioner Sophia T. Strom underwent rhinoplasty surgery on June 21, 1971, at the United States Public Health Service Hospital in San Francisco. Prior to this surgery petitioner had not experienced any breathing difficulties except for sneezing due to an allergy. During the operation she heard one of the doctors call out, "You're cutting too much." Pet. App. A-3. Petitioner developed breathing difficulties after the surgery. Dr. James Kauth, who performed the surgery, told petitioner that these breathing problems were a normal consequence of the operation and that the problem would disappear in time. *Id.* at A-2, A-7.

In March 1973, Dr. Kauth diagnosed petitioner's breathing problems as being caused by a "deviated upper septum." He advised petitioner to undergo additional surgery to correct the deviated septum, but petitioner declined to have further surgery at that time. On March 19, 1974, petitioner consulted Dr. Allen Sherman, a physician in private practice, who advised her that the rhinoplasty operation had caused the deviated septum. Pet. App. A-2.

2. On March 10, 1976, petitioner commenced this medical malpractice action against the United States, the Public Health Service Hospital, and Dr. Kauth and Dr. Edward Falces, its employees, in the United States District Court for the Northern District of California, under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* Concluding that the underlying facts were undisputed, the district court granted summary judgment for the United States. The court found that, in the exercise of reasonable diligence, petitioner should have discovered the acts constituting malpractice within the two-year statute of limitations for tort claims against the government (28 U.S.C. 2401(b)). The court thus rejected petitioner's argument that her complaint was timely because her claim had not accrued until March 19, 1974, when she consulted Dr. Sherman.[1]

The court of appeals affirmed (Pet. App. A-1 to A-8). The court concluded (*id.* at A-4 to A-5):

> Though [petitioner] may not have actually known that the operation had caused her injuries, through reasonable diligence she should have learned that her injuries had been caused by the operation. She had enough information so that, as a matter of law, her cause of action began to accrue from March of 1973.

---

[1]The order of the district court is not reproduced in the appendix to the petition. For the convenience of the Court, the order is set out in full as an appendix hereto.

3. The decisions below are both plainly correct and consistent with prior decisions of this Court. Further review is therefore unwarranted.

As this Court has recently held, a plaintiff must bring suit in a malpractice action against the government within two years of the time of injury and her awareness of its probable cause. *United States* v. *Kubrick*, 444 U.S. 111 (1979). As both courts below held, the undisputed facts establish that petitioner, in the exercise of reasonable diligence, should have discovered the injury and its cause no later than March 1973, when she learned that her breathing difficulties were caused by the deviated septum. See *Hungerford* v. *United States*, 307 F. 2d 99 (9th Cir. 1962), overruled on other grounds, *Ramirez* v. *United States*, 567 F. 2d 854 (9th Cir. 1977). The statute of limitations must therefore be deemed to have commenced running in 1973, rather than from the time, in 1974, when she actually learned that the deviated septum was due to the rhinoplasty. This Court has specifically held that "Congress [did not] intend[] that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." *United States* v. *Kubrick, supra*, 444 U.S. at 123. Petitioner's contention that her claim accrued in 1974 is therefore without merit.

Alternatively, petitioner suggests (Pet. 12) that because she "was continuously and exclusively under the care and treatment of Dr. Kauth * * * from the time of the operation on June 21, 1971, until March 14, 1974," when she consulted Dr. Sherman, the statute of limitations was tolled until the latter date. In support of this contention, petitioner relies upon *Kossick* v. *United States*, 330 F. 2d 933 (2d Cir.), cert. denied, 379 U.S. 837 (1964), which she interprets as holding that "the statute of limitations regarding claims made for medical malpractice under the Federal Tort Claims Act [*sic*] are tolled as long as the patient/physician relationship continues" (Pet. 11). In *Kossick*, however, the

Second Circuit made clear that the statute of limitations will not be tolled indefinitely where, as here, the plaintiff was put on notice by the facts as to the cause and cure of the injury, and "nothing more in the way of remedy could be accomplished." *Kossick* v. *United States, supra,* 330 F. 2d at 936. See also *Modave* v. *Long Island Jewish Medical Center,* 501 F. 2d 1065, 1078-1079 (2d Cir. 1974). Petitioner's reliance on *Kossick* is therefore misplaced.

Petitioner also argues (Pet. 10-11, 13-14) that the district court, contrary to the principle that all inferences of underlying fact should be liberally construed in favor of the party opposing the motion for summary judgment, impermissibly "drew all inferences against petitioner" (Pet. 14). However, the two extracts from the district court's opinion upon which petitioner relies in making this argument (Pet. 10-11) merely state the undisputed facts, which show that petitioner had sufficient information concerning her injury to be put on notice of a possible malpractice claim in March 1973. The district court drew no factual inferences against petitioner; it is because petitioner's position was not supported by the legal inferences that must be drawn from these facts that the district court correctly held that the government was entitled to summary judgment as a matter of law.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1981

DOJ-1981-08

APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. *C-76-2704 SC*

ORDER

SOPHIA T. STROM,
PLAINTIFF,

VS.

UNITED STATES OF AMERICA,
UNITED STATES PUBLIC HEALTH
SERVICE, ET AL.,
DEFENDANTS.

This is an action brought under the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq., for medical malpractice. The matter is before the court on the motion of the United States for summary judgment on the ground that the action is barred by the two-year statute of limitations. 28 U.S.C. § 2401(b).

A claim was filed on March 10, 1976, with the Government and on December 3, 1976, a complaint was filed in this court. Plaintiff alleges that Doctors Kauth and Falces at the Public Health Service Hospital in San Francisco were negligent in their performance of a nasal operation performed on plaintiff on June 21, 1971.

The United States contends that this action is time barred because the claim was filed more than two years after the claim accrued. 28 U.S.C. § 2401(b). It alleges that plaintiff

was informed by Dr. Kauth as early as March 18, 1973, that she had a deviated septum which required surgery in order to alleviate breathing problems she was having. This corrective surgery was again discussed in a meeting between plaintiff and Dr. Kauth in May, 1973. From this, the Government argues, plaintiff was on notice of facts upon which she now bases her claim of negligence and she should have filed her claim no later than March 18, 1975.

For her part plaintiff states that she did not discover her injury until March, 1974, when she was examined by another physician, Dr. Sherman; that she was not told by Dr. Kauth of the cause of her breathing problem, whether it was from the operation or otherwise. She furthers avers that when told of her breathing problem Dr. Kauth advised that this was normal and would take time to correct itself. (She does not deny that Dr. Kauth recommended nose surgery in 1973.) Strom Affidavit dated August 8, 1978.

In medical malpractice actions brought under the Federal Tort Claims Act, a claim "accrues against the Government [and consequently the time to file a claim begins to run] when the claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice." *Hungerford* v. *United States,* 307 F. 2d 99, 102 (9th Cir. 1962); see also, *Tyminski* v. *United States,* 481 F. 2d 257 (3d Cir. 1973).

The pertinent inquiry in the case at bar is when plaintiff came to possess "knowledge of facts sufficient to alert a reasonable person that there may have been negligence related to the grievance for which the complaint was subsequently made." *Brown* v. *United States,* 353 F. 2d 578, 580 (9th Cir. 1965); see also, *Jordon* v. *United States,* 503 F. 2d 620, 623 (6th Cir. 1974).

It is not disputed that plaintiff had breathing difficulties that developed soon after the operation in 1971, that Dr. Kauth diagnosed a deviated septum in March and May of 1973 and recommended surgery to correct the condition, and that Dr. Sherman, in March, 1974, diagnosed a deviated septum. In view of plaintiff's possession of this information from Dr. Kauth and its nature concerning plaintiff's nose, the court concludes that plaintiff was put on notice as early as March, 1973, that "there may have been negligence related to the grievance" made in this action and that through the exercise of reasonable diligence plaintiff should have discovered the acts constituting malpractice.

Plaintiff may have arguably been misled by Dr. Kauth into believing her breathing problem would "resolve itself" and, therefore, not required to bring suit during that period. *Exnicious* v. *United States*, 563 F. 2d 418 (10th Cir. 1977). However, where it continued for nearly two years at which time Dr. Kauth advised that an operation for a deviated septum should be undertaken, at that time plaintiff was apprised of sufficient facts to alert a reasonable person that there may have been negligence in the original operation in 1971.[1] See, *Casias* v. *United States*, 532 F. 2d 1339 (10th

---

[1]Indeed, plaintiff and her counsel admit as much: From plaintiff's Memorandum of Points and Authorities at page 3:

> The present case of Mrs. Strom was led to believe that the problems she was having with her nose were the normal consequence of having a rhinoplasty operation and relied on said representations until she was urged by Dr. Kauth to have a subsequent operation performed.

From the Declaration of Malcolm McPhee quoting parts of plaintiff's deposition, at page 2:

> "Q. Now, on the first visit to Doctor Sherman, did he tell you—what did he tell you about the problems you were having breathing?

Cir. 1976); *Reilly* v. *United States*, 513 F. 2d 147, 150 (8th Cir. 1975); *Hall* v. *United States*, 314 F. Supp. 1135 (N.D. Cal. 1970). This finding is borne out by plaintiff's visit to Dr. Sherman in 1974 when he advised her that the cause of her problem was a deviated septum and that this injury was caused by the operation in 1971.

Plaintiff's averments that she was not informed by Dr. Kauth of and did not actually discover the cause of her breathing problem until March, 1974, are unavailing. The failure of Dr. Kauth to inform plaintiff of the cause is not determinative. It is not required that the doctor have said the same before plaintiff will be held to have knowledge of a claim. *Brown* v. *United States, supra.* Nor is plaintiff's subjective knowledge determinative. It is an objective

---

A. I had a deviated septum.

Q. Was that the first time you'd ever been told that?

A. No. Doctor Kouth (sic) mentioned that. And he wanted to operate. And that was why I went to Doctor Sherman to find out what was the problem to have a different opinion.

Q. When was the first time Doctor Kouth (sic) mentioned to you that you had a deviated septum?

A. That was about the same time, when I went and had an appointment with Doctor Sherman. Beginning of '73, I believe.

Q. And at no time before that had Doctor Kouth (sic) ever mentioned to you that there was a problem with your nose that wouldn't cure in the ordinary course of time?

A. No. He said it would take time because of the problem I had with the kind of skin and the swelling, and it took a long time.

Not until he said he wanted to operate again.

Q. When did he first tell you he wanted to operate again?

A. That's what I'm saying. I believe it was in '73.

Q. And, then, in '73, was the first time he ever told you that there was a problem that you had that wouldn't cure by itself?

A. Right.

standard considering all facts known to plaintiff that is to be applied in determining the claim accrual date. See, *Kubrick* v. *United States,* 435 F. Supp. 166, 185 (E.D. Pa. 1977).

Plaintiff also seeks to invoke the rule that during a patient's continuous treatment by the allegedly negligent doctor the limitation period does not commence to run. *Kossick* v. *United States,* 330 F. 2d 933 (2d Cir. 1964); *Accardi* v. *United States,* 356 F. Supp. 218 (S.D.N.Y. 1973). It is not free from doubt that such a rule exists in the Ninth Circuit. See, *Brown* v. *United States, supra;* compare, *Ashley* v. *United States,* 413 F. 2d 490, 493 (9th Cir. 1969); and other circuit court decisions interpreting the *Ashley* case; *Tyminski* v. *United States, supra; Cooper* v. *United States,* 442 F. 2d 908, 912 (7th Cir. 1971).

Assuming *arguendo,* the existence of the rule in this circuit, it does not change the accrual date in the case at bar. Application of the continuous treatment rule would make no sense in a case such as this where plaintiff is in possession of information sufficiently grave to alert her to the fact that the operation in 1971 may have been improperly performed and medical malpractice may have resulted. Being aware of these facts in 1973, the statute of limitations began to run at that time and is not tolled by the circumstance that plaintiff was still being treated by Dr. Kauth during that period. See, *Reilly* v. *United States, supra; Tyminski* v. *United States, supra,* 481 F. 2d at 264 n.5; *Ashley* v. *United States, supra.*

In accordance with the foregoing it is hereby ordered that the government's motion for summary judgment is granted on the ground that the claim was not filed within the two-year period after the claim accrued under the Federal Tort Claims Act.

Date: August 11, 1978.

Samuel Conti

United States District Judge